

United States
COURT OF APPEALS
for the Ninth Circuit

Switchmen's Union of North America, General Adjustment Committee — Southern Pacific Company, Switchmen's Union of North America; Neil T. Speirs, as International Vice President, Switchmen's Union of North America; and John R. Burge, as General Chairman and as Acting General Chairman, Switchmen's Union of North America,

Appellants,

-vs-

Southern Pacific Company, a Corporation, and Brotherhood of Railroad Trainmen, et al.,

Appellees.

PETITION OF SWITCHMEN'S UNION OF NORTH AMERICA, ET AL., FOR REHEARING

Appeal from the United States District Court, Northern District of California, Southern Division

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The Switchmen's Union of North America; General Adjustment Committee — Southern Pacific Company, Switchmen's Union of North America; Neil T. Speirs, as International Vice President, Switchmen's Union of North America; and John R. Burge, as General Chairman and as Acting General Chairman, Switchmen's

Union of North America, respectfully petition this Court to grant a rehearing and upon such rehearing to hold that the counterclaim filed by the Switchmen's Union states a good cause of action which this Court will determine on the merits, and upon such determination of the merits to hold that the check-off agreement is invalid insofar as it applies to employees represented by the Switchmen's Union. As grounds for such rehearing, petitioners show:

1. We believe that this Court through inadvertence overlooked the fact that this is an appeal from the dismissal of the counterclaim filed by the Switchmen's Union (Tr. 46-49) as well as from the dismissal of the complaint. The counterclaim met all the requirements of a valid suit (Tr. 16-23). It alleged that the counterdefendants, by entering into a dues deduction agreement applicable to yardmen for whom the Switchmen had been certified as exclusive representative, violated the collective bargaining rights guaranteed to the Switchmen's Union by the Railroad Labor Act (Tr. 20-21). The counterclaim sought the usual injunctive relief appropriate to such a violation of the Switchmen's Union's rights under the Railway Labor Act (Tr. 23). The court below had treated the counterclaim as properly before it and decided the issues therein raised on the merits (Tr. 46-47).

If the original complaint for declaratory judgment were in any respect defective as not showing the existence of an actual controversy, it could be dismissed, but the Switchmen's Union would still have the right to a

decision on the merits on its counterclaim. *Pioche Mines Consol. v. Fidelity Philadelphia Trust Co.*, 9 Cir., 1953, 205 F.2d 336, 337.

The counterclaim stated a cause of action for violation of the rights of the Switchmen's Union as collective bargaining representative in all material respects the same as the causes of action often held within federal cognizance by the federal courts.

In holding that the Switchmen's Union is an "entire stranger" to the dues deduction agreement between the Brotherhood of Railroad Trainmen and the Southern Pacific Company, this Court refuses to follow *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 548, 549. The position of the Switchmen's Union in this suit is the same as the position of the System Federation in that suit. Here the Switchmen's Union has been certified by the National Mediation Board as the exclusive bargaining representative of all the yardmen employed by the Southern Pacific Company (Tr. 4, 17, 27). There the System Federation had been certified as the exclusive representative of the shop craft employees of the Virginian Railway Company (300 U.S. at 539). In both instances the carrier failed to accord the certified bargaining representative exclusive recognition in that the carrier entered into, or claimed the right to enter into, a collective bargaining agreement with another labor organization applicable to employees for which the certified union was the exclusive representative. Here it is admitted that the Southern Pacific Company has entered into a collective bargaining agreement with the

Brotherhood of Railroad Trainmen which by its terms and as applied by the parties fixes certain terms and conditions of employment of yardmen, namely, that as a condition of employment, yardmen who are members of the Brotherhood of Railroad Trainmen and who sign authorization slips, shall have dues checked off from their wages and paid to the Brotherhood of Railroad Trainmen (Tr. 6-8, 9-13, 16, 20, 26, 27, 36, 43-44). There, the Virginian Railway maintained it had the right to deal with an unaffiliated association as the representative of such of its shop craft employees as chose it as their bargaining agent (300 U.S. at 522-523, 539-540). The Supreme Court held that the System Federation could enjoin the Virginian Railway from dealing with anyone other than the System Federation with respect to the employees represented by the System Federation (300 U.S. at 548-549).

A dues check-off agreement is a collective bargaining agreement. *N.L.R.B. v. Reed & Prince Mfg. Co.*, 1 Cir., 1953, 205 F.2d 131, 136. By entering into the dues check-off agreement with the Brotherhood of Railroad Trainmen applicable to the yardmen for which the Switchmen's Union was the exclusive representative, the Southern Pacific Company violated its obligation to bargain exclusively with the Switchmen's Union as to all matters pertaining to yardmen.

In distinguishing *Texas & New Orleans R.R. v. Brotherhood*, 281 U.S. 548 (1930), on the ground that was "An action by a union to force the employer to accord to its (sic) rights guaranteed to it by statute, such

as its right to bargain with the employer," this Court ignores that this case involves precisely that issue. The complaint alleged a controversy between the carrier and the union which represented yardmen over the right of the union to bargain for yardmen to the exclusion of any other union (Tr. 4, 7-8). The counterclaim filed by the Switchmen's Union alleged that the dues check-off agreement with the Brotherhood of Railroad Trainmen violated the collective bargaining rights guaranteed to the Switchmen's Union by the Railway Labor Act (Tr. 20-21).

In addition to the *Virginian Railway* decision in the Supreme Court, there are numerous lower court decisions which recognize the status of a certified union to litigate any alleged violation of its collective bargaining rights. In *Smith v. B & O R.R. Co.*, S.D. Oh. W.D., 1956, 144 F. Supp. 869, 873, the Brotherhood of Railroad Trainmen and the Baltimore and Ohio Railroad Company had entered into a union shop agreement which the Order of Conductors claimed violated its rights as the certified bargaining representative of conductors. In holding that the court had jurisdiction to decide the case on the merits at the instance of the Conductors, the court said (144 F. Supp. at 873):

"The Conductors, as a railway labor organization, likewise do not have any administrative remedy available to them under the procedure provided by the Railway Labor Act as the bargaining representative of the class and craft of conductors on the defendant's railroad, which rights the defendants have violated and are threatening to violate, and this court has jurisdiction and power to grant injunctive relief to protect the rights of representation of said organization."

For other cases in which unions have been granted injunctive relief to protect their collective bargaining rights under the Railway Labor Act against bargaining with another union see *Brotherhood of R.R. & S.S. Clerks v. Virginian Ry. Co.*, 4 Cir., 1942, 125 F.2d 853, 859; *Railway Employees Coop. Ass'n v. Atlanta B & C R. Co.*, D. Ga., 1938, 22 F. Supp. 510, 514-515. Cf. *Nashville, C & St. L. Ry. v. Ry. Employees' Dept. of A.F.L.*, 6 Cir., 1937, 93 F.2d 340, 341, 344; *Railway Clerks v. Atlantic Coast Line R.R. Co.*, 4 Cir., 1953, 201 F.2d 36, certiorari denied, 345 U.S. 992; *Railroad Yardmasters v. Pa. R. Co.*, 3 Cir., 1955, 224 F.2d 226, 228; *Myers v. Louisiana & A. Ry. Co.*, W.D. La., 1933, 7 F. Supp. 92 (Myers sued both individually and as general chairman of the Order of Railway Conductors); same, W.D. La., 1934, 7 F. Supp. 97.

The status of the certified bargaining representative as the proper party to protect its exclusive bargaining rights cannot be made to depend upon the extent of the invasion of its rights. The certified representative's bargaining rights exclude all dealings with anyone other than the representative chosen by the majority. *Order of Railroad Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 347; *J. I. Case v. N.L.R.B.*, 321 U.S. 332, 338-339; *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 683-684; *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44.

2. If this Court should persist in its view that the Switchmen's Union did not have such an interest in setting aside the dues deduction agreement as to create an

actual controversy, we respectfully urge the Court to modify its opinion so that the Switchmen's Union may by an amended counterclaim make a party to the case one or more of the employees who are aligned with it in interest and have an actual controversy with the Southern Pacific Company and the Brotherhood of Railroad Trainmen. The Court by its opinion speaks only of an amended complaint. Fairness and equity require that there be extended to the Switchmen's Union an equal opportunity to file an amended counterclaim. Cf. *Pioche Mines Consol. v. Fidelity Philadelphia Trust Co.*, 9 Cir., 1953, 206 F.2d 336, 337.

For the foregoing reasons it is respectfully urged that this Court grant a rehearing of this case and decide it upon the merits. If our request for a rehearing is denied, it is respectfully urged that leave be granted the Switchmen's Union to file an amended counterclaim naming as additional counter-plaintiffs other persons who have an actual controversy with the counter-defendants.

Respectfully submitted,

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